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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

Reply Brief for Plaintiff in Error.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.

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In the Supreme Court of the United States.

October Term, 1903. No. 61.

GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads for the State of Michigan,
Defendant in Error.

Reply Brief for Plaintiff in Error.

The plaintiff in error has already filed two briefs, which no doubt fairly cover the points in controversy. An additional brief having been filed by the other side, it will be considered sufficient to add a short memorandum to the matter already before the Court.

The additional brief, at page 2, refers to the comparative conditions of the respondent company and other companies in the state. It should be said that the respondent is a north and south road, and is not what might be termed a trunk line. Its chief competitors are the Pere Marquette and the Jackson, Lansing & Saginaw, both of which extend in practically parallel courses—the former to Petoskey, on Little Travers Bay, and the latter to Mackinaw, on the Straits. These lines, with some others less important, are the chief competitors of the respondent, and all are at liberty to charge three cents per mile, their earnings not having reached the $2,000 limit.

Respondent's line was originally the Grand Rapids & Indiana Rail*road* Company, while the reorganized company is different only in respect to its being Rail*way*.

For convenience, the following data may well be repeated here:

Oct. 1, 1869, the first mortgage, $5,375,000 of which is still unpaid.

Aug. 1, 1884, an additional mortgage of $3,000,000.

On the same date, a third mortgage, with a limit of $10,000,000.

Aug., 1889, the section of the General Railroad Law amended, having reference to rates.

July, 1896, reorganization took place.

March, 1901, decision of the Supreme Court of Michigan, holding that interstate earnings should be included.

Two questions only, need to be here noticed.

First, in arriving at the gross earnings of respondent's passenger trains, was it proper to include interstate earnings?

Second, shall respondent be denied the benefit of the Fourteenth amendment to the Federal Constitution?

The first point was discussed in the principal brief filed by the respondent, at page 14, and following. Counsel seeks to sustain this action under the authority of Home Life Insurance Co. vs. New York, 134 U. S., 549, and Maine vs. Grand Trunk Railway Company, 142 U. S., 217. It has already been pointed out that these cases are not applicable to the present record. The case in Maine related to the state's revenues, and the question was whether interstate earnings might be used as a basis for arriving at a suitable tax. The doctrine was carried to its fullest extent in that case, as may be inferred by the dissent of four of the members of the Court. The present question, as has been urged, can be likened to Smith vs. Ames, in 169 U. S., 466, and the cases therein cited. This case, as distinguished from those cited, has reference to the limitation of earnings, and it seems to us that the doctrine is sufficiently well settled that for such purpose the receipts from domestic service alone may be considered. If

the Court should sustain our view, it would follow that, since without interstate earnings the gross receipts were less than $2,000 per mile, the initial proceeding was without warrant, and should now be dismissed.

Second. The other point has reference to the status of the mortgagees of this property after they had foreclosed the equity of redemption. The other briefs cover the argument and citation of cases, and a brief memorandum need only be given here.

It is conceded: 1st. That an appeal to the Federal Constitution would have been open to the Grand Rapids & Indiana Rail*road* Company if no foreclosure had taken place.

2nd. Also to the purchasers (bondholders) at the foreclosure sale, if they had not made the certificates of reorganization.

3rd. That the rate fixed by law is unreasonable, and would be void under the Federal Constitution, if the respondent was free to claim the protection of that instrument.

It must be borne in mind that the laws of Michigan were generous in providing that railraod corporations might borrow money, issuing their bonds therefor, and securing such bonds by mortgage upon their property. The state was also careful to provide for an easy method of taking over the property in case the mortgagor should default. These provisions are found in the Act of 1873, and even anterior to that time. In case the bondholders should take the place of the stockholders upon foreclosure, and join in the simple certificate provided for, the corporation thus formed should have "the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed."

Counsel for the state, however, relies upon the concluding words in the clause, which says that such corporations should thereupon be complete, "with all the powers and rights secured to railroad companies under this act, to all the provisions of which and amendments thereto, it should be subject."

The contention is, that because the law was amended after the mortgage took effect, and before the reorganization, the reorganized owners were bound by the intermediate amendment, and should be denied an appeal to the Federal Constitution. It seems to us that the argument of counsel is entirely fallacious, and that the cases cited by him are not applicable.

We need not urge that an appeal to the Federal Constitution is open to all railroad corporations at any time when it may be shown in any particular case that the limitation of its charges amounts to the taking of its property without due process of law, and a denial of the equal protection of the law.

It will be sufficient for us to say that when the company borrowed money and issued its bonds as evidence thereof, and secured the same by a mortgage on its property, the holders of these securities obtained a continuing interest in the property, a standing which the Court would have recognized at any time, and that the sheltering arm of the Federal Constitution continued to protect them when through misfortune they were compelled to become the owners of the property itself. We need not urge that the state made a contract with these parties in respect to amendments. It will be sufficient for us if it shall be held that the law which promised them protection was not a mere delusion, and that instantly they took the property under the mortgage they were not subject to the confiscation of their security, if the intermediate amendment should amount to that.

Suppose the amendment had required that passengers be carried at a half cent per mile—a rate which, if enforced, would result in a substantial loss for each passenger carried. The bondholders, before foreclosure, could have resisted this limitation. Why should they not have the same protection after the re-incorporation as before?

The difference between the case at bar and the one supposed, is one of degree only, since the demurrer admits that the rate fixed by the amendment is an inadequate one.

We admit that the Legislature might amend the statute in

respect to rates, and that such amendment would be binding upon the old company as well as the new, but we claim the same protection as the old company if the amendment should be vicious and destructive, and amount to a denial of reasonable compensation in the operation of the property.

It is idle to urge that the bondholders, after the foreclosure, could have continued to operate the property as partners. It was necessary in their own interest to create a corporate identity under which the business could go forward. It was necessary in the public interest that some responsible body should be within easy reach to be coerced into a compliance with police regulations, and to be answerable in the Courts. Moreover, the first or prior mortgage was still outstanding, and without a reorganization, the holders of the bonds secured thereby would have promptly applied for a receiver. They were therefore obliged to incorporate, and it seems to us that the Court would be slow to penalize them in the way proposed for so doing.

The statute invoked by counsel does not in terms bear out his argument, and we have yet to find a case binding upon this Court which sustains that doctrine.

See

Home Insurance Co. vs. Morse, 87 U. S. (20 Wall.), 445.

Southern Pacific Co. vs. Denton, 146 U. S., 202.

Barron vs. Burnside, 121 U. S., 186.

Counsel makes reference to three cases, but it seems to us that neither of them affords any support to his contention. We are content to invite a careful scrutiny of those authorities.

The point made by counsel that the Supreme Court of Michigan passed upon a controlling domestic question, and that therefore this Court will not take jurisdiction, has been already discussed in the preceding briefs. None of the points passed upon or decided by the Supreme Court of Michigan is one of state or local law. They are upon their face necessarily Federal questions. A possible point in the record

which might be said to be local was not decided by the Court. Even that question, however, would have been local only so far as it related to rights or privileges derived from the state exclusively, and depending entirely on state laws. But the rights insisted upon here are not derived from the state, they are rights which it has under the National Constitution, and could not be interfered with or restricted in any state law, or by any construction of such law which the state Courts might give.

It has these rights quite independent of any provision in the state statute, as the owner of the property in question.

The record shows that the company has nearly $6,000,000 of capital stock. It has been noted that when the second, or $3,000,000, mortgage was foreclosed, there was a third mortgage outstanding. More than $4,000,000 of bonds had been issued under the latter, and at the time of foreclosure, these bonds, with a large arrearage of interest, were owing. There was also a considerable floating debt. It was considered equitable to recognize these holdings, and this could be only done in the way of stock in the new company. That course was taken, and the capital stock was thus fully paid.

T. J. O'BRIEN,

JAMES H. CAMPBELL,

For Defendant in Error.